



U.S. Citizenship
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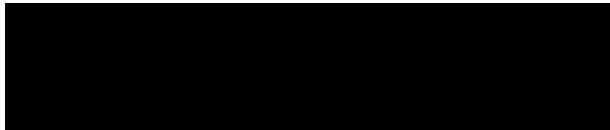
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FILE: SRC 02 050 55409 Office: VERMONT SERVICE CENTER

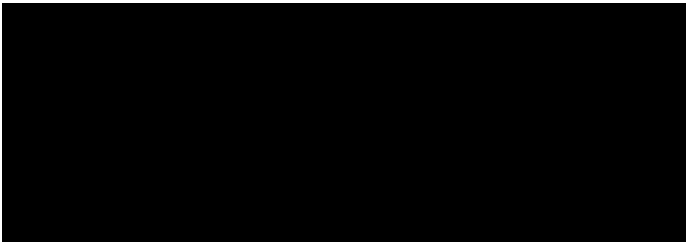
Date: MAR 31 2004

IN RE: Petitioner:
Beneficiary:



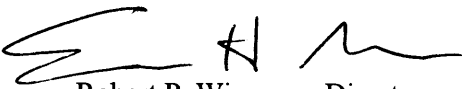
PETITION: Immigrant Petition for a Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to
the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

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prevent clearly unwarranted
invasion of personal privacy*

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a marble, granite, and tile importing and installation company. It seeks to employ the beneficiary permanently in the United States as a tile installation supervisor. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel contends that the director failed to adequately consider that the petitioner has employed the beneficiary as a contractor.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g) also provides in pertinent part:

(2) *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

Eligibility in this case rests upon the petitioner's continuing financial ability to pay the wage offered as of the petition's priority date. The regulation at 8 C.F.R. § 204.5 (d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is January 14, 1998. The beneficiary's salary as stated on the labor certification is \$40,924 per year based on a 40-hour week. The record indicates that the petitioner was established in 1993 and is organized as a corporation.

As evidence of its ability to pay, counsel initially submitted a copy of the petitioner's Form 1120, U.S. Corporation Income Tax Return for the year 2000. It indicates that the petitioner files its returns based on a standard calendar year from January through December. Counsel also submitted a copy of the petitioner's internally generated "history journal," which summarizes payroll records. The journal reflects that the petitioner paid the beneficiary \$700 on June 17, 2000 and \$1,425 on December 1, 2000. This record further indicates that the petitioner has employed the beneficiary as a contractor on various occasions during the past few years.

The information set forth on the petitioner's 2000 corporate tax return reveals that it declared a taxable income before net operating loss deduction (NOL) of -\$40. Schedule L of this tax return also shows that the petitioner had

\$2,876 in current assets and -\$35,086 in current liabilities, producing -\$32,210 in net current assets. CIS will consider net current assets because it represents the amount of liquidity that a petitioner has as of the date of filing. Net current assets represent the level of cash or cash equivalents that would reasonably be available to pay the proffered salary during the year covered by the Schedule L balance sheet. Here, neither the petitioner's taxable income before the NOL deduction of -\$40, nor its net current assets of -\$32,210, was sufficient to cover the \$38,799 difference between the petitioner's payments to the beneficiary for contractor services of \$2,125 and the approved wage offer of \$40,924.

On April 21, 2002, the director requested additional evidence from the petitioner relevant to its ability to pay the beneficiary's proffered wage. The petitioner responded by submitting copies of its 1997-2001 corporate tax returns. As the priority date of January 14, 1998 is covered by the petitioner's 1998 corporate return, the period from January 1998 to the present is of most concern to the determination of the petitioner's ability to pay the beneficiary's proposed salary of \$40,924.

The petitioner's 1998 corporate tax return reveals that the petitioner declared \$6,532 in taxable income before the NOL deduction. Its Schedule L balance sheet shows that it had \$8,155 in current assets and -\$8,319 in current liabilities, producing -\$164 in net current assets. Again, neither the petitioner's taxable income of \$6,532, nor its net current assets of -\$164 could meet the proposed salary of \$40,924.

The 1999 tax return discloses that the petitioner declared no taxable income before the NOL deduction and had \$4,126 in current assets and -\$7,219 in current liabilities. The beneficiary's proposed salary could not be paid out of a zero balance of taxable income or -\$3,043 in net current assets.

The petitioner's 2001 corporate tax return shows that it again declared no taxable income before the NOL deduction. Schedule L reflects that the petitioner had \$8,888 in current assets and -\$48,081 in current liabilities. Either the petitioner's net current assets of -\$39,193 or its taxable income figure of zero could not meet the \$40,924 proffered wage.

The petitioner also submitted its history journal covering the payroll period during 2001 and a vendor disbursement report for the period from January 1, 1997 through December 31, 2002. They show that the petitioner paid the beneficiary the following amounts:

1998	\$34,283.50
1999	3,015.50
2000	2,125.00
2001	5,304.00
2002	4,257.00

Even assuming that the petitioner's payments to the beneficiary represented solely wages paid for his services as a tile installation supervisor, it does not change the conclusion that the petitioner has failed to establish its ability to pay the proffered wage during any of the salient years. The difference between the sum the petitioner paid the beneficiary in 1998 and the proffered salary could not be met by either the petitioner's taxable income of \$6,532 or its net current assets of -\$164.

The director denied the petition using similar reasoning. He noted that the petitioner's payments to the beneficiary amounted to only \$3,015 in 1999. The petitioner's declared income of \$0.00 fell \$37,909 short of the

funds needed to cover the difference. In 2000, the petitioner's -\$40 in taxable income was also far short of the \$40,964 necessary to cover the difference between the petitioner's payments to the beneficiary of \$2,125 and the proffered wage. The shortfall in 2001 was \$35,620, which the petitioner's \$0.00 taxable income could not meet. Thus, the AAO concurs with the director's conclusion and would note that the petitioner's net current assets figures for 1999, 2000 and 2001 of -\$3,043, -\$32,210, and -\$39,193, respectively, were also far short of the funds needed to pay the difference between the proffered wage and the petitioner's payments to the beneficiary during those years.

On appeal, counsel states that although the petitioner employed the beneficiary regularly as a contractor, sometimes the petitioner paid the beneficiary and sometimes the petitioner's customers paid the beneficiary directly. Counsel asserts that the petitioner should not be penalized because the beneficiary lacked employment authorization. As a consequence, the petitioner was unable to hire him as a regular employee or retain employment records. Counsel cites no authority for this assertion. It remains the petitioner's burden to prove eligibility for the benefit sought in this proceeding. The petitioner must establish the elements for the petition's approval at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). If the petitioner employed the beneficiary and is seeking credit for the amounts paid to him, then it should produce a credible documentary basis for computing that credit. That the beneficiary may have had no work authorization does not logically relate to the petitioner's alleged failure to keep records of some of the payments made for his services, particularly where it has submitted documentation related to specific dates of payments through 2002. Moreover, if third parties paid the beneficiary independently for his work, it is not reasonable to credit the petitioner for his services. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel also contends that because the prevailing wage has risen from \$21,000 to more than \$40,000, then CIS should have used the earlier wage of \$21,000 as a test of the petitioner's ability to pay the proffered salary. Counsel's contention concerning the origin of the proffered wage, and the prevailing wage rate, is incorrect. The AAO notes that, according to the Department of Labor certifying officer's initials on the approved labor certification application, the proposed salary increase to \$40,924 was amended by the petitioner on October 11, 1999. Even if counsel's method were used, as discussed above, the evidence has not established the petitioner's ability to pay a lower wage salary of \$21,000 during 1999, 2000 or 2001.

Counsel asserts that the petitioner's gross income figures should be considered in the determination of the petitioner's ability to pay the proffered salary. In determining the petitioner's ability to pay the proffered wage, CIS reviews the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. V. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Counsel contends that the petition could have been approved based on the beneficiary's wages as a subcontractor set forth as contract labor within "other costs" on Schedule A of its corporate tax returns.

Counsel's assertion is not persuasive. The evidence in the record fails to correlate the total payments made to the beneficiary to the figures set forth as "contract labor" on the petitioner's corporate tax return attachments. The visa petition, as well as the petitioner's documents submitted to the record, instead suggests that the petitioner employed more than one subcontractor. The tax return figures do not segregate payments made to the beneficiary from other subcontractors.

Counsel also asserts that the beneficiary's ability to generate additional income for the petitioner should be considered if the beneficiary were allowed to be employed as a salaried employee and his contractor portion of project income were included in the petitioner's gross income. This assertion is somewhat contrary to counsel's earlier contention that the beneficiary has been regularly employed as a contractor, either paid directly by the petitioner's customers on specific projects or paid by the petitioner. If these were the petitioner's projects, then one must conclude that the income generated has already been reported on the petitioner's tax returns. As such, based on the modest or negative balances reported as net income or net current assets on the petitioner's corporate tax returns, it is not clear how the beneficiary's services have significantly helped the petitioner's revenue, if it has regularly employed him, or how that becomes a basis to project substantial increases. It is noted that changing individuals from contractors to salaried employees also adds additional expenses that must be borne by an employer.

In the context of the financial records contained in the record, counsel asserts that *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) is applicable where the expectations of increasing business and profits support the petitioner's ability to pay the proffered wage. That case relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturier. No unusual or unique circumstances have been suggested to exist in this case, which parallel those in *Sonogawa*. Nor does the evidence demonstrate that the petitioner has suffered unusual losses within a framework of profitable years. Based on the net income figures shown on the relevant tax returns, the petitioner has consistently reported a low income during the relevant period.

Based on the evidence contained in the record and after consideration of the assertions further presented on appeal, we cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered salary as of the priority date of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.